SUPREME COURT, U. S.

No. 556

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In the

Supreme Court of the United States

October Term 1964

SAKRETE OF NORTHERN CALIFORNIA, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above matter on May 21, 1964, a timely Petition for Rehearing filed on June 19, 1964 having been denied on this matter on July 9, 1964.

OPINIONS BELOW

The original and supplemental intermediate reports of the Trial Examiner appointed by the National Labor Relations Board are reported in 137 N.L.R.B. 1223 and 140 N.L.R.B. 767.

The decisions and orders of The National Labor Relations Board in favor of Respondent are reported in 137

N.L.R.B. 1220, 140 N.L.R.B. 765 and 142 N.L.R.B. No. 27 and are set out in the Appendix to this Petition at pages 29 to 42.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 332 F. 2d 902 and is set out in the Appendix to this Petition at pages 14 to 27.

JURISDICTION

The opinion of the Court of Appeals was entered on May 21, 1964. A timely petition for rehearing was filed on June 19, 1964 and denied July 9, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (I).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may assert jurisdiction over an employer whose activities are conceded not to be within the statutory jurisdiction of the Board, basing such jurisdiction solely on the premise that such employer has common ownership, officers and control with an interstate employer located elsewhere?

2. Whether the Court should resolve the conflict between the Ninth Circuit in the present case and the Tenth Circuit in *N.L.R.B.* v. *Shawnee Milling Co.*, 184 F. 2d 57 existing with respect to the question above which the Ninth Circuit has answered in the affirmative and the Tenth Circuit has answered in the negative?

3. Notwithstanding the concession of the government that Petitioner is not within the statutory jurisdiction of the National Labor Relations Board, can the Board or the Court below make any finding of "effect on commerce" when the question is in issue and no evidence of direct or indirect affect on commerce is presented?

STATUTES INVOLVED

29 U.S.C. in part provides:

"Sec. 152—Definitions

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "Affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

"Sec. 158—Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, that nothing in this sub-chapter or in any

other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 159 a() of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159 (a) of this title, in the appropriate collective-bargaining date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159 (a) of this title."

"Sec. 160—Prevention of unfair labor practices — Powers of Board generally.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor

practice (listed in Section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith."

STATEMENT

1. The Proceedings Below

This action arises through the filing of a complaint charging the commission of unfair labor practices by Petitioner in violation of Sections 8(a), (1), (2), (3) and (5), and 2(6) and (7) of the National Labor Relations Act as amended, 29 U.S.C., Sections 151, et seq. The complaint was issued by the Regional Director of the National Labor Relations Board, Twentieth Region, on August 14, 1961.

The Trial Examiner, M. M. Miller, on original hearing, recommended that the matter be dismissed for lack of jurisdiction. Thereafter, the National Labor Relations Board, in part, accepting the findings of fact of the Trial Examiner, overruled his conclusions with respect to jurisdiction, and referred the matter back for supplemental findings which were subsequently made by him. Thereafter, the National Labor Relations Board issued its order and finally on April 24, 1962, its supplemental order, citing Petitioner for the commission of certain unfair labor

practices, and ordered what were deemed by the Board to be appropriate remedies. Thereupon a Petition for Review as provided for under Sections 10 (e) and (f) of the National Labor Relations Act, as amended, 29 U.S.C., Section 151, et seq. was filed with the United States Court of Appeals for the Ninth Circuit, resulting in the opinion of that Court as issued May 21, 1964, affirming the order of the N.L.R.B. A timely Petition for Rehearing was filed with the United States Court of Appeals for the Ninth Circuit on June 19, 1964 and the same was denied July 9, 1964.

2. The Facts

For purposes of this Court, on the sole question presented here, that of jurisdiction, Petitioner accepts the Government's statement of the case (except as noted) as set forth in the Government's brief to the Court of Appeals for the Ninth Circuit at pages 3-5:

> "Petitioner Sakrete of Northern California, Inc. (hereinafter 'Sakrete-California' or 'petitioner') is a California corporation which maintains facilities for the production of dry concrete, mortar and plaster mixes in Milpitas, California (R. 30-31; Tr. 30-31). These products are prepared with patented equipment, pursuant to a set formula, and are packaged and sold under a registered trade name owned by Sakrete, Incorporated (hereinafter 'Sakrete'), an Ohio corporation which also holds an exclusive license to use the patented production equipment mentioned above (R. 31; Tr. 12). Sakrete licenses approximately 26 firms throughout the United States to produce Sakrete products, Sakrete-California being one of the firms so licensed. (R. 31; Tr. 16-17).
>
> "Both Sakrete-California and Sakrete are wholly owned by Arthur C. Avril and his wife (R. 31; Tr. 10, 265). Mr. Avril is president of both firms; Mrs. Avril is vice president and treasurer of Sakrete and

secretary-treasurer of Sakrete-California. George Riehl and Joseph Orbaugh are, respectively secretary of Sakrete and vice president of Sakrete-California. The officers also constitute the boards of directors of both organizations (R. 31; Tr. 10). Sakrete's officers-directors serve in the same capacity for A. & T. Development Corporation, which manufactures and sells the patented production machinery used by Sakrete licensees (R. 31; Tr. 34-35).

"Both Sakrete and Sakrete-California process and sell the same products, and both use special equipment supplied by A.&T. Development Corporation (R. 32). Sakrete-California, as a licensee of Sakrete, must conform to quality standards set by Sakrete and may not sell any products without the approval of Sakrete (ibid). Sakrete may also dispatch a staff member or a qualified specialist to Sakrete-California's plant, at the latter's expense, to check its operations, or to train or advise its employees. (R. 32; G. C. Ex. No. 2).

"Arthur Avril, as president of Sakrete, establishes all policies concerning wages, hours and conditions of employment for that company (R. 33; Tr. 16-17, 42). He is also responsible for sales, the purchase of supplies, and the hire and discharge of employees (R. 33; Tr. 42). Sakrete sold and shipped products valued in excess of $50,000 to customers located outside the State of Ohio and purchased materials valued in excess of $50,000 from sources outside that State during the year preceding the unfair labor practice hearing (R. 32; R. 6-7, 11).

"Sakrete-California's general rules with respect to wages, hours and conditions of work, as well as all matters concerning contracts and sales, are the responsibility of its president, Arthur Avril, who presides at all its business meetings and makes all major economic decisions (R. 33; Tr. 19).[5] Sakrete-California sells and

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"[5] Daily local decisions concerning expenditures, hiring, discharge or discipline of employees are, according to President Avril, entrusted to Philip Schneider, petitioner's executive secretary (R. 33; Tr. 20, 32, 51). However, it is undisputed that Avril possesses the final authority in all matters and that he has in the past, made decisions on matters which were local in nature (R. 33; Tr. 19, 21-22)."

delivers materials to out-of-state customers, but its operations do not by themselves meet the Board's gross inflow-outflow requirements for assertion of jurisdiction (R. 31-32)."**

As the Government further observed at page 12 of its brief:

"Sakrete concededly meets all statutory[10] and discretionary[11] standards for the Board's assertion of jurisdiction, while Sakrete-California, considered alone, does not. Thus, the only jurisdictional question presented is whether, as found by the Board (R. 33-34), these two companies constitute a single employer for jurisdictional purposes."

REASONS FOR GRANTING THE WRIT

Petitioner urges that the writ should be granted in the present case for the following reasons:

First — the decision of the Ninth Circuit in the present case is in direct conflict with the decision of the Tenth Circuit in *NLRB* v. *Shawnee Milling Co.*, 184 F. 2d 57; and

Second — that while the jurisdictional questions presented may appear quite narrow in scope, they, in fact, represent a substantial extension of Federal jurisdiction not heretofore deemed to be present.

**Note — It must be observed that the Government was in error here — Evidence in the matter indicated that during its three year existence prior to this proceeding, Petitioner had made only one isolated sale in interstate commerce (R. 209, Tr. 373). This sale was not pertinent to this proceeding as it occurred in July or August of 1961 (R. 209, Tr. 373), a month following the commission of the allegedly unfair practice on which this matter was based (R. 69, et seq.).

10-11 Footnotes not pertinent.

1. THE CONFLICT

In the present case Petitioner clearly has ownership, officers and control in common with Sakrete, Incorporated. Petitioner is also a licensee of Sakrete, Incorporated, along with numerous other independent companies. Petitioner does manufacture and sell the same items as Sakrete, Incorporated. This, however, is where the relationship terminates. The record does not display any operational integration or interdependency between the two companies and there was no holding of such. The Ninth Circuit emphasized the relationship existing due to common ownership, officers and control, but stated as an ipse dixit that this resulted in integration to the extent that the two companies could be considered as one in order to confer Federal jurisdiction over Petitioner.

In the *Shawnee Milling* case the Tenth Circuit dealt with an employer, Pauls Valley Co., which was a wholly owned and controlled division of Shawnee Milling Co. Here, between Pauls Valley and Shawnee Milling, quite obviously, there existed common control, ownership and officers. Pauls Valley, the employer over which jurisdiction was sought, had a local manager subject to overall supervision as to policies, including labor policies, as does Petitioner.

As the Court in *Shawnee Milling* very succinctly stated:

> "To hold that under these conditions the common ownership of the two plants subjects Pauls Valley, a purely intrastate operation, to the jurisdiction of the Board would be to hold that one may not operate two businesses, wholly separate and apart — one engaged in interstate business and the other in intrastate operations — without subjecting both to the jurisdiction of the Board." 184 F. 2d 57 at 59.

This the Tenth Circuit refused to do in *Shawnee Milling* but the Ninth Circuit has done in the present case.

There is no facet of the relationship existing in the present case between Petitioner and Sakrete, Incorporated that must not have obviously existed in *Shawnee Milling*. Moreover, the record shows no indication, and indeed there can be none, that a labor disturbance in Petitioner's plant would disturb or affect Sakrete, Incorporated, and, indeed, neither the N.L.R.B. nor the Ninth Circuit have purported to make such a holding. This, too, creates a situation on all fours with *Shawnee Milling*, where the Court stated:

> "There is nothing in the record or in the stipulated facts which would warrant a finding that a labor disturbance in the Pauls Valley plant would have an impact upon the operations at the Shawnee plant, or that the discontinuance of operations at Pauls Valley would cast an undue burden upon the operations of the plant at Shawnee." 184 F. 2d 57 at 59, 60.

We submit that the present case is in direct conflict with *Shawnee Milling* and that such conflict should be resolved by the Court in order that the N.L.R.B. and litigants may be able to determine their rights more clearly.

II. IMPORTANCE OF THE QUESTIONS

To our knowledge, no case dealing with Federal jurisdiction over labor matters has yet exceeded the basic boundaries laid out in *N.L.R.B.* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1. The holding of the Ninth Circuit in the present case, however, extends these boundaries substantially further through the device of relying on rules of the National Labor Relations Board, which rules have no real pertinence to the type of case herein presented and which as applied in the present case make no sense whatsoever.

This Court very clearly held in *Jones & Laughlin* that:

> "The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds." 301 U.S. 1, at 37.

We entirely agree with the basic premise of the Board that if such an integrated relationship and interdependence exists between an intrastate employer and an interstate employer that any stoppage or labor disturbance involving the intrastate employer would affect the interstate employer, there is undoubtedly a burden and effect on commerce which can cause the intrastate employer to be subjected to the act. We further have no difficulty with the premise that a multistate operation, consisting of various intrastate operations, so phased together as to in essence create a single interstate operation, can and has been held subject to the Act.

The sole question, as we have stated, is whether or not a clearly intrastate operation which is managed and operated without regard to any other corporation and with no interdependence or integration with any other corporation, can be held subject to the Act solely because the same person is the owner, chief executive, and has control even though the activities of one play no part in the considerations concerning the control of the other.

The National Labor Relations Board and Ninth Circuit have both discussed the application of the so-called "single employer" doctrine enunciated by the Board, and applied the tests stated under such doctrine in getting to the results in this case. The "single employer" doctrine, as spelled

out by the Board in its 21st Annual Report at pages 14-15, purports to give guide lines as to when two employers are so closely related that they may be treated as a single entity for purpose of Board determination. Heretofore such determinations dealing with this doctrine that have reached the Courts have always been in the area of determining an appropriate bargaining unit. See, e.g., *N.L.R.B.* v. *Elias Brothers,* 325 F. 2d 360 (6th Cir.), or in asserting jurisdiction over an employer who is clearly within the statutory jurisdiction of the Board but whose inflow and outflow have not met the minimum self imposed requirements of the Board. See, e.g., *N.L.R.B.* v. *Williams,* 195 F. 2d 669 (4th Cir.). In these latter cases, as obviously they might, the Courts have held that the Board has pretty much carte blanche discretion in subjecting such employers to the Act, since the only reason for non-application of the Act is through the Board's own discretionary rules of inflow and outflow. It is well to note, however, that even in these cases there has always been some finding of direct integration and interdependence between the employers concerned. The present case makes no such requirement and directly subjects Petitioner to the jurisdiction of the Board without any evidence of effect on commerce and even without any presumption of effect on commerce.

Such a holding on its own, or if carried through logical extremes, can and does and can in the future create the opening for considerable extension of Federal jurisdiction. This is not only clear in the labor field but in the myriad other statutes premised upon effect on commerce. If ownership, control and officers in common with an interstate operation are to be considered the sole tie necessary to subject a purely intrastate business to the test of affecting commerce, the presence of Federal jurisdiction in almost any case dealing with subsidiary or brother-sister corporations would be substantially extended.

Needless to say, we have in the foregoing paragraph indicated why we believe the writ should be granted. We further believe that in light of the existing case law to which we have heretofore referred, there can be no question but that the N.L.R.B. and the Ninth Circuit were in error in allowing the assertion of Federal jurisdiction over Petitioner, and we submit that the writ should be granted, and the holdings below reversed.

CONCLUSION

The holding of the Ninth C[illegible]it that a purely intrastate employer whose activities are not shown in any manner to have any effect upon commerce or upon a corporation engaged in commerce or affecting commerce itself may be held subject to the jurisdiction of the Board, has created a direct conflict with the Tenth Circuit and has, in addition, created a substantial extension of Federal jurisdiction without any rational basis. We believe that this conflict should be resolved to avoid uncertainty and confusion both among litigants and the Board, and, further, that the jurisdictional question posed herein should be clearly resolved in order to afford and restore meaningful limits to the jurisdiction of the Board.

Respectfully submitted,

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October 5, 1964.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18,745

SAKRETE OF NORTHERN CALIFORNIA, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

(May 21, 1964)

Petition to Review and Petition to Enforce Order of the National Labor Relations Board

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Before: MADDEN, Judge of the Court of Claims, HAMLEY, and JERTBERG, Circuit Judges

HAMLEY, Circuit Judge:

Sakrete of Northern California, Inc. brought this proceeding to review certain parts of a supplemental decision

and order of the National Labor Relations Board reported at 140 N.L.R.B. 765.[1] The Board decision and order adopted, with certain modifications and additions, a supplemental intermediate report of the Board's trial examiner reported at 140 N.L.R.B. 767.

In his conclusions of law, thus adopted by the Board, the trial examiner held that in five different respects petitioner had engaged in unfair labor practices. Most of these practices were deemed to be detrimental to Freight Construction, General Drivers and Helpers, Local 287, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("union"). The examiner's recommended order provided that petitioner shall cease and desist from each of these practices and these recommendations were accepted by the Board. The examiner's recommended order also provided that petitioner shall take certain remedial action, and these recommendations were accepted by the Board except that provisions concerning back pay and reinstatement were modified.

In the petition for review, it is alleged that the Board erred in asserting jurisdiction over petitioner, erred in ordering petitioner to cease and desist from the five practices specified in the order, and erred with respect to two of the six kinds of remedial action ordered.

Pursuant to stipulation thereafter entered into, however, petitioner now questions only: (1) the Board's jurisdiction over petitioner under the National Labor Relations Act, as amended, 61 Stat. 136 et seq. (1947), 29 U.S.C. § 151 et seq. (1958), "Act"; (2) one of the trial examiner's findings of fact, namely the finding that petitioner had refused to

[1] The decision and order was supplemental to an original decision and order reported in 137 N.L.R.B. 1220. In its original decision and order the Board rejected the trial examiner's original intermediate report (137 N.L.R.B. 1223) recommending dismissal of the complaint for jurisdictional reasons, asserted jurisdiction, and remanded the case to the trial examiner for further proceedings.

bargain collectively with the union, in violation of section 8(a) (5) of the Act, 29 U.S.C. § 158(a) (5);[2] and (3) one of the remedial actions ordered, namely that petitioner, on request, bargain collectively with the union as the exclusive representative of all production and maintenance employees employed at petitioner's Milpitas, California plant, with exclusions not here material.

Jurisdiction. Petitioner is a California corporation engaged in the production and sale, at Milpitas, California, of concrete mortar and plaster mixes, and the sale of an asphalt product. Employed at this plant are Philip V. Schneider, who, under the job title of executive secretary, has overall charge of the plant; Ray Freeman, whose job title is production superintendent; and a secretary, a truck driver, and two production and maintenance employees. The mixes are sacked and sold, under the trade name "Sakrete," to dealers in Northern California. Petitioner makes practically no out-of-state sales and it is conceded that its operations do not by themselves meet the Board's gross interstate inflow-outflow requirements for assertion of jurisdiction.

The "Sakrete" trademark is owned by Sakrete, Inc. (Sakrete), an Ohio corporation which, in addition to producing "Sakrete" products in the Cincinnati, Ohio area, licenses twenty-six other firms, including petitioner, to use the "Sakrete" trademark.[3] Sakrete owns no interest in any of the firms which it licenses. It is itself concededly subject to Board jurisdiction by reason of the nature and amount of its interstate operations.

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[2] On the basis of this finding petitioner was ordered to cease and desist from refusing to bargain with the union and, upon request, to bargain collectively and in good faith with the union.

[3] By the terms of the license, petitioner agrees, among other things, to use the trade name in a specific territory, and Sakrete agrees to maintain the validity of the trade name and prevent its use by unauthorized persons.

The Board found and determined that petitioner's operations should be considered together with Sakrete's operations as a "single employer" for jurisdictional purposes and since Sakrete was subject to Board jurisdiction, so was petitioner.

The Board often treats separate corporations as one employer for jurisdictional purposes where it is found that the firms, despite their nominal separation, are highly integrated with respect to ownership and operation.[4] Petitioner apparently does not challenge the validity of the Board's "single-employer" concept and, in any event, that concept has been given effect by the courts. See *A. M. Andrews Co.* v. *N.L.R.B.*, 9 Cir., 236 F.2d 44.[5] Petitioner

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[4] A discussion of the early development of this Board principle, and of the principal factors which this Board weighs in deciding whether there is the requisite integration to constitute two corporations a "single employer," is set out in the 21st Annual Report of the Board, pages 14-15, where this statement appears:

> "In applying the present jurisdictional standards, the Board early reaffirmed the long-established practice of treating separate concerns which are closely related as being a single employer for the purpose of determining whether to assert jurisdiction. The question in such cases is whether the enterprises are sufficiently integrated to consider the business of both together in applying the jurisdictional standards.
>
> "The principal factors which the Board weighs in deciding whether sufficient integration exists include the extent of:
>
> "1. Interrelation of operations;
> "2. Centralized control of labor relations;
> "3. Common management; and
> "4. Common ownership or financial control.
>
> "No one of these factors has been held to be controlling, but the Board opinions have stressed the first three factors, which go to show 'operational integration,' particularly centalized control of labor relations. The Board has declined in several cases to find integration merely upon the basis of common ownership or financial control." (Footnotes omitted.)

[5] See, also, *e.g.*, *N.L.R.B.* v. *Elias Bros. Big Boy, Inc.*, 6 Cir., 325 F.2d 360; *N.L.R.B.* v. *Royal Oak Tool & Mach. Co.*, 6 Cir., 320 F.2d 77, 80181; *N.L.R.B.* v. *Jones Sausage Co.*, 4 Cir., 257 F.2d 878, 879-880; *N.L.R.B.* v. *A. K. Allen Co.*, 2 Cir., 252 F.2d 37, 38-40.

contends, however, that the facts of this case do not warrant the conclusion that petitioner and Sakrete are a single employer for jurisdictional purposes.

In the stipulation referred to earlier in this opinion, the parties agreed that the statement of fact set forth in the Board's original decision and order reported at 137 N.L.R.B. 1220, and in its supplemental decision and order reported at 140 N.L.R.B. 765, ". . . are assumed to be true, correct and supported by substantial evidence on the record as a whole." In its opening brief thereafter filed in this court, petitioner nevertheless attacks seven specific findings of fact pertinent to the jurisdictional question, made by the Board in its original report.[6] In view of the stipulation we will accept, as true and correct, the Board's findings of fact bearing upon the question of jurisdiction, as paraphrased below.

Throughout the period with which this case is concerned, Mr. and Mrs. Arthur C. Avril have owned the entire capital stock of Sakrete. Mr. Avril has functioned as the firm's president, Mrs. Avril as its vice president and treasurer, and George Riehl as its secretary. These officers also constitute the corporate board of directors. Mr. and Mrs. Avril likewise own all the capital stock of petitioner. Mr. Avril functions as its president, Mrs. Avril as its secretary-treasurer, and Joseph Orbaugh as its vice president. These officers also constitute petitioner's corporate board of directors. Sakrete's officers and directors function in the same capacity for A. & T. Development Corporation, an Ohio corporation located in Cincinnati, which manufactures and sells the patented machinery used by "Sakrete" licensees.

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[6] Petitioner begins its attack upon these findings with this introductory statement:

> "The Board's Finding of Facts (Vol. I, pp. 32 and 33) is a complete distortion of the relationship of the parties and unsupported by the evidence."

Petitioner's and Sakrete's conduct of business operations are substantially parallel. Both sell the same products and use special patented equipment supplied by A. & T. Development Corporation. Petitioner, as licensee, must conform to quality standards set by Sakrete and may not sell any products not approved by that company. There is no regular interchange of employees between the two. Sakrete, however, possesses the right to dispatch a staff member or some qualified specialist employed by any licensee's firm, to petitioner's plant in order to check its operations, and in order to train or advise petitioner's personnel.

No central accounting system is employed, and no formal report is made by petitioner to Sakrete, respecting its expenditures and profits. But Avril admitted that, as president of petitioner, he presides at all of petitioner's business meetings, makes all major economic decisions, and keeps close watch over petitioner's overall operations. He is the ultimate authority for both companies, whose operating policies and procedures are thus almost identical.

Avril, as president of Sakrete, establishes all of that company's policies with regard to wage scales, hours and conditions of employment. He is also responsible for its sales, purchases of supplies, and its hire and discharge of employees. Avril establishes all the general rules with respect to wages, hours and conditions of work at petitioner's plant, and makes all major decisions with regard to contracts of purchase and sale.

While executive secretary Schneider has overall charge of petitioner's Milpitas plant and apparent authority to make local decisions, in practice the scope of his decisions has been very narrow. Avril admitted that, as president of respondent, the right of ultimate authority in all matters resides in him. In the exercise of this authority he has made decisions which were local in nature, such as hiring employees.

It was Avril who negotiated by telephone with his struck employees at Milpitas when the labor dispute developed which gave rise to this proceeding. On that occasion Avril stated that Schneider had acted outside his authority when he had "laid off" the employees who went out on strike. It therefore cannot be said that Avril does nothing more than set general policy for the Milpitas plant, or that Schneider exercises authority in regard to all local matters.

In summary, the facts show that the operations of petitioner and Sakrete are closely integrated, that their labor relations policies are almost identical and are centrally controlled, that the management of both resides virtually in one man, and that both are commonly owned and financially controlled.

Based upon these findings of fact the Board concluded that the two companies constitute a "single employer" for jurisdictional purposes.

In challenging this conclusion petitioner first argues that there is no substantial evidence in the record which supports a finding of interrelationship of operations, centralized control of labor relations, or common management except at the executive or top level. Petitioner contends that there must be interrelationship, centralized control and common management at the local level in order to apply the "single employer" concept.

It is doubtful whether petitioner is in a position to argue that there was no interrelationship, centralized control and common management on the local level, for this would appear to constitute an attack upon findings which it has stipulated are ". . . true, correct and supported by substantial evidence on the record as a whole." The Board, as indicated above, found that the local manager's authority was limited and that Avril has made decisions which were local in nature pertaining to the hiring and laying off of employees and negotiations with employees on strike. In its

findings, the Board expressly stated: ". . . we cannot agree that Avril does nothing more than set general policy for the Milpitas plant, or that Schneider exercises authority in regard to all local matters."[7]

But, assuming that it is now open to petitioner to attack these findings, they are in any event supported by substantial evidence. Moreover, even if the substantial evidence shows interrelationship of operations, centralized control of labor relations, or common management only at the executive or top level, we do not agree that this precludes application of the "single employer" concept.

Petitioner bases its argument that there must be mutuality of control of the two companies on the local level on the hypothesis that mutuality of control at the executive level is concomitant with common ownership of financial control, one of the four criteria applied by the Board in determining whether two companies should be regarded as a single employer. See note 4. It follows from this, petitioner asserts, that the three other criteria applied by the Board, relating to centralized control of labor relations, common management, and interrelation of operations, must pertain to normal or current business operations at the local level.

But while the power to control on all levels may be a concomitant of common ownership or financial control, and so embraced within that particular Board criterion, the actual exercise of that power is not. The three other criteria deal not with power and authority, as such, but with its exercise. Thus interrelationship of operations, centralized control of labor relations, and common management, on any level, are considerations in addition to the factor of common ownership or financial control.

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[7] We need not decide whether it is necessary to show interrelationship of operations and centralized control of labor relations on the local level in order to establish that two companies constitute a "single employer" for jurisdictional purposes. [This footnote is modified by the order denying rehearing. See Appendix B, page 28.]

Apart from the argument, which we reject, that the Board's criterion contemplates interrelationship, centralized control and common management at the local level if two companies are to be regarded as a "single employer," no other reason is suggested or occurs to us why mutuality of control at the local level must be shown. Seldom would it be practicable for two companies situated in different parts of the country to be managed at the local level by one man or management group. If there is overall control of critical matters at the policy level, the fact that there are variances in local management decisions will not defeat application of the "single employer" principle.

As its second argument against the Board's conclusion that petitioner and Sakrete constitute a "single employer" for jurisdictional purposes, petitioner calls attention to the decision of this court in *N.L.R.B.* v. *Santa Cruz Packing Co.*, 9 Cir., 91 F.2d 790, aff'd 303 U.S. 453.

The *Santa Cruz* case, decided in 1937, did not involve the "single employer" problem, and it is doubtful whether that concept had yet been thought of.[8] The decision of this court in *Santa Cruz*, insofar as here pertinent, stands for the proposition that where the Board's jurisdiction rests not on the interstate activities of an employer, but upon the effect its intrastate activities have upon interstate commerce, only those plants of the employer which have such an effect upon interstate commerce will be deemed subject to Board jurisdiction. The Oakland plant of the Santa Cruz Fruit Packing Co. was held to have such an effect, and the Seabright plant was held not to. Thus the Board was found to have jurisdiction over the Oakland plant but not the one at Seabright. No such jurisdictional problem being involved

[8] See 21st Annual Report of the Board, pages 14-15, giving the background of the "single employer" theory, but citing no case earlier than 1948.

in our case, we need not consider whether the *Santa Cruz* case was correctly decided.[9]

We hold that the Board did not err in asserting jurisdiction over petitioner.

Refusal to bargain. The Board found that the petitioner, among other things, had violated section 8(a) (5) and (1) of the Act by refusing to bargain with the union. Petitioner does not deny that it refused to bargain, but argues that under the particular facts of this case, it was entitled to refuse to do so.

The pertinent facts are that all four of petitioner's employees—two plant workers, a truck driver, and the production supervisor, Freeman, signed authorization cards with the union. The union's representative approached Schneider and proposed that petitioner enter a collective bargaining agreement covering all four workers. Schneider apparently knew that the proposed unit included the three workers and the supervisor, Freeman, but he did not specify that the reason for refusing to bargain was that the supervisor was included in the group.[10] Nevertheless, petitioner argued before the Board and argues now that he was entitled to refuse to bargain since the proposed bargaining unit was inappropriate.

It is true that under section 14 of the Act, 29 U.S.C. § 164(a) (1958) petitioner was entitled to refuse to treat his supervisor as an employee covered by the Act. But this does not preclude the petitioner and the union from enter-

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[9] The employer, but not the Board, appealed to the Supreme Court from our decision in *Santa Cruz*. It follows that the correctness of our decision as to the lack of Board jurisdiction over the Seabright plant was not before the Supreme Court.

[10] This failure to specify the reason for refusing to bargain lends support to the Board's argument that the original refusal to bargain was motivated by petitioner's anti-union sentiments, and that the issue raised here was merely an afterthought which played no part in the original refusal to bargain. See *N.L.R.B.* v. *Clearfield Cheese Co.*, 3 Cir., 213 F.2d 70, 74.

ing into an agreement covering the supervisor if they choose to do so. Cf. *N.L.R.B.* v. *News Syndicate Co.*, 365 U.S. 695. Accordingly, the union committed no unfair or unlawful act in proposing that the supervisor be covered by the proposed collective bargaining agreement.

Petitioner's course of action was to object to the inclusion of Freeman in the bargaining unit, not to refuse to bargain altogether.[11] Of course, if the exclusion of Freeman from the unit had resulted in the union's failure to have a majority in the remaining unit, petitioner would have been entitled to refuse to bargain. *Home Stores, Inc.*, 87 N.L.R.B. 335. But here the exclusion of Freeman from the unit did not affect the union's majority in the remaining unit; as to them the union continued to have unanimous support.

A refusal to bargain under these circumstances constitutes an unfair labor practice. *N.L.R.B.* v. *National Motor Bearing Co.*, 9 Cir., 105 F.2d 652, 660; *N.L.R.B.* v. *Philamon Laboratories, Inc.*, 2 Cir., 298 F.2d 176, 179-180. Since petitioner has stated no reason why he should not have been required to bargain with the union, the Board did not err in finding that there was a refusal to bargain.

The order to bargain. Petitioner questions a remedial provision of the Board order which directs it to bargain with the union. The facts are that petitioner's four employees went on strike on August 16, 1961, and were discharged later that day. They were offered reinstatement by petitioner at a later date, but they all refused the offer. Petitioner now argues that because none of the employees who belonged to the union are now employed or have any interest in being employed by petitioner, the Board ought

[11] Although we are of the view that the union's proposal to include Freeman in the bargaining unit was not illegal, petitioner's refusal to bargain is not excused even if the union had made an illegal proposal in its bargaining demands. *N.L.R.B.* v. *Sunrise Lumber & Trim Corp.*, 2 Cir., 241 F.2d 620; *N.L.R.B.* v. *White Constr. Co.*, 5 Cir., 204 F.2d 950.

not to require the petitioner to continue to bargain with the union.

We think that this issue is controlled by our decision in *N.L.R.B.* v. *Andrew Jergens Co.*, 9 Cir., 175 F.2d 130, 134. There we held that the Board could order an employer to bargain with a union even though none of the union members were employed at the time of the Board order. This is consistent with the principle that

> ". . . an employer may not set up as a justification for its refusal to bargain with a union the defection of union members which it had itself induced by unfair labor practices, even though the consequence is that the union no longer has the support of a majority. In such circumstances the employer will be required to bargain notwithstanding the union does not presently have a majority." *N.L.R.B.* v. *Idaho Egg Producers, Inc.*, 9 Cir., 229 F.2d 821, 823.

Petitioner argues, however, that the Board is required to consider the effect of the unfair labor practices on the change of union membership, and find that such labor practices did in fact effect a change, before it can order petitioner to bargain with the union. In this particular case, argues petitioner, the Board failed to make these required findings.

We find no support for petitioner's argument. The Supreme Court has held that the Board has wide discretion "to determine how the effect of prior unfair labor practices may be expunged." *International Ass'n of Machinists* v. *N.L.R.B.*, 311 U.S. 72, 82. Consistent with this position, the Supreme Court has allowed the Board to order employers to bargain collectively with unions which have lost their majority status after the employer had wrongfully refused to bargain with it, even though there was no finding that the loss of majority was directly caused by the refusal to bargain itself. *Frank Bros. Co.* v. *N.L.R.B.*, 321

U.S. 702; *N.L.R.B.* v. *P. Lorillard Co.*, 314 U.S. 512. The Court's opinion in *Franks Bros., supra* at 706, makes it clear that *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, cited by petitioner, is not inconsistent with this position.[12]

As we said in *N.L.R.B.* v. *Andrew Jergens Co.*, 9 Cir., 175 F.2d 130, 135, the Board may grant this kind of order without making a finding that the loss of membership resulted from unfair labor practices, since,

> ". . . it is reasonable to assume that in the presence of unfair practices a decline in employee support does not reflect an untrammeled expression of the employees' will, and that the unfair practices must be purged before the representation question can be accurately determined."

The petitioner further argues that since its present employees have no interest in the union, they should be given a right to a representation of their own choosing and to not have one foisted upon them by the Board. No injustice is done petitioner's employees, however, in view of the fact that the Board's order does not establish the union as the employees' permanent representative, *Frank Bros. Co.* v. *N.L.R.B.*, 321 U.S. at 705. After the union has had a reasonable time in which to establish itself, petitioner's employees will have a procedure whereby they can establish that they prefer representation other than that of the union. *Superior Engraving Co.* v. *N.L.R.B.*, 7 Cir., 183 F.2d 783, 794.[13]

The Board did not err in ordering petitioner to bargain collectively in good faith with the union.

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[12] See also, *NL.R.B.* v. *Andrew Jergens Co.*, 9 Cir., 175 F.2d 130, 135, and cases cited therein on this point.

[13] See, National Relations Act § 9(c) (1) (A) (ii), as amended, 61 Stat. 143 (1947), 29 U.S.C. § 159(c) (1) (A) (ii) (1958).

In its answer to the petition for review, the Board has requested enforcement f its order. For the reasons stated, the Board order is affirmed and a decree will issue enforcing it.

* * *

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18745

SAKRETE OF NORTHERN CALIFORNIA, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

On Petition for Rehearing

ORDER

Before: MADDEN, Judge of the Court of Claims,
HAMLEY and JERTBERG, Circuit Judges.

Note 7 on page 6 of the slip opinion herein is amended to read as follows:

"7. Petitioner asserts that the stipulation, read as a whole, indicates that the parties did not reach agreement on the facts referred to above. The Board apparently does not share this view."

The petition for rehearing is denied.

J. WARREN MADDEN
Judge of the Court of Claims
FREDERICK G. HAMLEY
GILBERT H. JERTBERG
United States Circuit Judges

ENDORSED
FILED JULY 9, 1964

FRANK H. SCHMID

APPENDIX C

137 NLRB No. 131 D-4001
Stockton, California

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 20-CA-2069

SAKRETE OF NORTHERN CALIFORNIA, INC.

and

FREIGHT, CONSTRUCTION, GENERAL DRIVERS AND HELPERS, LOCAL 287, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER REMANDING CASE TO THE TRIAL EXAMINER

On April 6, 1962, Trial Examiner Maurice M. Miller issued his Intermediate Report in the above-entitled proceeding, recommending dismissal of the complaint for jurisdictional reasons, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Charging Party and the General Counsel filed exceptions to the Intermediate Report together with supporting briefs and a request by the General Counsel that this case be remanded to the Trial Examiner.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the rulings of the Trial Examiner made at the hearing in connection with the jurisdictional issue and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case. We find merit in the exceptions, and, accordingly, do not adopt the Trial Examiner's conclusions or recommendations, but only his findings of fact which are not inconsistent with our Decision and Order herein.

Organized in October, 1958, as a California corporation, Sakrete of Northern California, Inc. engages in the production of packaged dry concrete, mortar and plaster mixes, which are sold to Northern California retail building material dealers, for local distribution. For the first two and one-half years of its existence, Respondent maintained a plant in East Palo Alto, California; during the late spring of 1961, however, productive operations were transferred to Milpitas, California, the plant involved in the instant proceeding. Respondent also sells "black top" asphalt mix, produced by a Southern California firm.

All products of Respondent are prepared with patented equipment, pursuant to a set formula, and are packaged and sold under the registered trade name "Sakrete." The registered trademark is owned by Sakrete, Incorporated, an Ohio corporation located in Cincinnati, which also holds an exclusive license to use specially designed and patented equipment to manufacture Sakrete by the methods described in the patents covering the equipment involved. Sakrete, Incorporated licenses approximately twenty-six other firms in the United States to use its patented equip-

ment and registered "Sakrete" trademark. Respondent is one of these licensees; the licensing agreement between Sakrete, Incorporated and Respondent is explained in detail in the Intermediate Report attached hereto.

Throughout the period with which this case is concerned, Mr. and Mrs. Arthur C. Avril have owned the entire capital stock of Sakrete, Incorporated. Mr. Avril has functioned as the firm's president, Mrs. Avril as its vice president and treasurer, and George Riehl as its secretary. These officers constitute the corporate board of directors, also. Mr. and Mrs. Avril likewise own all the capital stock of the Respondent firm. Mr. Avril functions as its president, Mrs. Avril as its secretary-treasurer, and Joseph Orbaugh as its vice president. These officers also constitute Respondent's corporate board of directors. Sakrete, Incorporated's officers and directors function in the same capacity for A. & T. Development Corporation, an Ohio corporation located in Cincinnati, which manufacturers and sells the patented machinery used by "Sakrete" licensees. No testimony was proffered with respect to the corporate stock ownership of A. & T. Development Corporation.

Before the Board will take jurisdiction, it must be shown that Respondent meets the Board's $50,000 inflow-outflow standards for nonretail enterprises.[1] Uncontroverted record testimony shows that the operations of the Respondent corporation, considered alone, do not meet the Board's jurisdictional requirements. The record does establish, however, that Sakrete, Incorporated, during the year preceding the hearing herein, sold and shipped products valued in excess of $50,000 to customers located outside of the State of Ohio, and that it purchased materials and supplies valued in excess of $50,000 which were shipped to it from outside the State of Ohio. Thus, the operations of Sak-

[1] *Siemons Mailing Service*, 122 NLRB 81.

rete, Incorporated meet the Board's jurisdictional requirements. The question remains whether Respondent's operations should be considered together with Sakrete, Incorporated's operations as a "single employer" for jurisdictional purposes. The Trial Examiner found that they should not; the Board disagrees.

The Board often treats separate corporations as one employer for jurisdictional purposes, where it is found that the firms, despite their nominal separation, are highly integrated with respect to ownership and operation. Some of the principal factors which have been considered relevant in determining the extent of integration are: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.[2]

The record reveals that Respondent and Sakrete, Incorporated's conduct of business operations are substantially parallel. Both sell the same products, and use special patented equipment supplied by a third firm having officers and directors identical with those of Respondent's licensor. Respondent, as licensee, must conform to quality standards set by Sakrete, Incorporated, and may not sell any products not approved by Sakrete, Incorporated. There is no regular interchange of employees between the two, but Sakrete, Incorporated possesses the right to dispatch a staff member, or some qualified specialist employed by any licensees' firm, to Respondent's plant in order to check its operations, and in order to train or advise Respondent's personnel. Although no central accounting system is employed, and no formal report is made by Respondent to Sakrete, Incorporated respecting its expenditures and profits, Avril admitted that, as president of Respondent, he presides at all of Respondent's business meetings, makes all major economic

[2] See N.L.R.B., Twenty-First Annual Report, pp. 14-15.

decisions, and keeps close watch over Respondent's over-all operations. He is the ultimate authority for both companies, whose operating policies and procedures are thus almost identical.

Admittedly, Avril, as president of Sakrete, Incorporated, establishes all of that corporation's policies with regard to wage scales, hours and conditions of employment, and is responsible for its sales, purchases of supplies, and its hire and discharge of employees. Although it was also admitted that Avril establishes all the general rules with respect to wages, hours and conditions of work at Respondent's plant, and makes all major decisions with regard to contracts of purchase and sale, there was some dispute among the parties as to who is responsible for the diurnal or "current" business operations. Respondent claims, and the Trial Examiner found, that these decisions have been made by Philip Schneider, Respondent's executive secretary, who has had over-all charge of the Milpitas plant.

Although we agree that Schneider was given apparent authority to make local decisions, the record shows that in practice, the scope of his decisions has been very narrow. The plant at Milpitas employs only a secretary, a truck-driver, and three production and maintenance employees, and had been operating there for only an approximate six months at the time of the hearing. Avril admitted that, as president of Respondent, the right of ultimate authority in all matters resides in him. He has made decisions which were local in nature, such as hiring employees. It was Avril who negotiated by phone with his struck employees at Milpitas. As a matter of fact, Avril stated that Schneider had acted outside his authority when he had "laid off" the employees who went out on strike. In view of these facts, we cannot agree that Avril does nothing more than set general policy for the Milpitas plant, or that Schneider exercises authority in regard to all local matters.

The fact of common ownership and financial control of Respondent and Sakrete, Incorporated, has been conceded. In view of these facts, and the record as a whole, and especially in view of the fact that the operations of Respondent and Sakrete, Incorporated are closely interrelated, that their labor relations policies are almost identical and are centrally controlled, that the management of both resides virtually in one man, and that both are commonly owned and financially controlled, we find that these two companies constitute a "single employer" for jurisdictional purposes. As the operations of Sakrete, Incorporated and Respondent, taken together, meet the Board's jurisdictional requirements, we shall assert jurisdiction over Respondent.[3]

Accordingly, we shall grant the General Counsel's motion to remand the case to the Trial Examiner for the preparation of a Supplemental Intermediate Report concerning the merits of the complaint.

ORDER

IT IS HEREBY ORDERED, that the above-entitled proceeding be, and it hereby is, remanded to the Trial Examiner for the preparation and issuance of a Supplemental Intermediate Report, setting forth his findings of fact, conclusions of law and recommendations with respect to the unfair labor practices alleged in the complaint herein.

Dated, Washington, D. C. July 10, 1962.

Frank W. McCulloch, Chairman
Philip Ray Rodgers, Member
John H. Fanning, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

[3] The Trial Examiner found, and we agree, that Respondent is engaged in commerce within the meaning of the Act.

APPENDIX D

140 NLRB No. 70 D-5067
Milpitas, Calif.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 20-CA-2069

SAKRETE OF NORTHERN CALIFORNIA, INC.
and
FREIGHT, CONSTRUCTION, GENERAL DRIVERS AND HELPERS, LOCAL 287, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

SUPPLEMENTAL DECISION AND ORDER[1]

On September 24, 1962, Trial Examiner Maurice M. Miller issued his Supplemental Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in

[1] The Trial Examiner's original Intermediate Report, which issued on April 6, 1962, recommended dismissal of the complaint for jurisdictional reasons. For reasons set forth in its original Decision and Order, 137 NLRB No. 131, the Board asserted jurisdiction and remanded the case to the Trial Examiner for the preparation and issuance of a Supplemental Intermediate Report with respect to the unfair labor practices alleged in the complaint.

the Intermediate Report attached hereto. Thereafter, the Respondent and the Charging Party filed exceptions to the Intermediate Report and supporting briefs.[2]

Pursuant to the provisions of Section 3(b) of the Act, the Board has relegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing in connection with the unfair labor practices involved and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Supplemental Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modifications and additions.

The Trial Examiner found that the Respondent discriminatorily discharged its striking employees on August 16, 1961; and that these employees "may have" abandoned their strike prior to September 15, 1961, when the Respondent offered them reinstatement. But in fashioning a remedy the Trial Examiner apparently assumed without qualification that the employees had abandoned the strike before September 15. We are unable, on the record before us, to make such a determination, and leave the question to the compliance stage of this proceeding. If it develops that the employees had abandoned their strike prior to the reinstatement offer, the Trial Examiner's recommendations shall apply. In such circumstances, the Respondent's reinstatement offer gave the employees an opportunity to resume their employment, satisfied the Respondent's obligation to reinstate them, and also tolled the Respondent's

[2] The Respondent's request for oral argument is hereby denied as, in our opinion, the record, exceptions, and briefs adequately present the positions of the parties.

liability for further backpay.[3] On the other hand, if it develops that the employees had not abandoned their strike before the date of the Respondent's offer of reinstatement, no backpay liability exists on the Respondent's part, the employees' strike continued to be a strike, and the Respondent continued to be obligated to reinstate them upon application. Accordingly, we shall amend the Trial Examiner's Recommended Order to provide for backpay and reinstatement of the strikers in a manner consistent with the foregoing.[4]

We reserve the right to modify this Order if warranted by circumstances arising subsequent to the close of the hearing in this case.

ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner, with the following modifications:

Paragraph 2(b), which begins "Make whole . . .," is hereby amended by adding: "and, upon application for reinstatement, reinstate Manuel Escajeda, Rual Dean Ellis, and Juan Patino, all in the manner provided in this Supplemental Decision. Interest at the rate of 6 percent per annum, to be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB No. 97,[5] shall be added to the backpay payments accruing under this Order."

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[3] We find no merit in the Union's contentions that the offer of reinstatement was not a valid offer, nor in its exceptions to the Trial Examiner's failure to order backpay from the time of discharge of the strikers rather than from the date they abandoned their strike.

[4] Because the employees never made an unconditional application for reinstatement, *Member Rodgers* does not agree with the provision for backpay from the date the employees abandoned the strike, and dissents from this part of the decision. See his dissent in *Sea View Industries, Inc.*, 127 NLRB 1402.

[5] For the reasons set forth in the dissenting opinion in *Isis Plumbing*, *Member Rodgers* would not award interest.

The last paragraph on page 1 of the "Notice to All Employees" is hereby amended by adding: "and WILL reinstate Manuel Escajeda, Rual Dean Ellis, and Juan Patino to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, all in the manner provided in the Board's Supplemental Decision."

Dated, Washington, D. C. Jan. 22, 1963.

Frank W. McCulloch, Chairman
Philip Ray Rodgers, Member
John H. Fanning, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX E

142 NLRB No. 27 D-5354
Milpitas, Calif.

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 20-CA-2069

SAKRETE OF NORTHERN CALIFORNIA, INC.

and

FREIGHT, CONSTRUCTION, GENERAL DRIVERS AND HELPERS, LOCAL 287, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA[1]

ORDER ON MOTION

On January 22, 1963, the Board issued its Supplemental Decision and Order (140 NLRB No. 70) in the above entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and ordering it to cease and desist therefrom and take

[1] Hereinafter referred to as Local 287.

certain affirmative action, as set forth in the Supplemental Decision and Order.[2]

On February 8, 1963, the Respondent filed with the Board a motion to modify the Board's Order, requesting that we eliminate the provision for backpay mentioned in footnote 2, since investigation had showed that Ellis had "lost interest" in the strike on August 26, 1961, and obtained employment on September 14, 1961, and that Escajeda and Patino had continued to strike until March 5, 1962, but now have other employment and do not desire reinstatement of their employment with Respondent. The Respondent also requested that the Board eliminate the requirement to bargain with Local 287. Local 287, on February 15, 1963, filed a letter of opposition to Respondent's motion, taking exception to the relief requested, but not to the statement of facts alleged in support of the Respondent's motion.

On March 15, 1963, the Board issued its Notice to Show Cause[3] why the Board should not incorporate the statement of facts contained in the Respondent's motion, and in Local 287's letter of opposition, into the record in the instant case. The notice was answered only by Respondent, who took no exception to the few facts contained in Local 287's letter of opposition. Accordingly, we hereby incorporate into the record in the instant case the state-

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[2] The Board found that the Respondent had violated Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act. The Board, *inter alia*, ordered the Respondent to make whole Manuel Escajeda, Rual Dean Ellis, and Juan Patino for any loss of pay they may have suffered by reason of their discriminatory discharge of August 16, 1961, and to reinstate those employees to their former or substantially equivalent positions. This Order was conditioned upon a determination whether any of these three employees had abandoned their strike before September 15, 1961. The Board reserved the right to modify its Order. The Board also ordered the Respondent, upon request, to bargain collectively in good faith with Local 287.

[3] Not published in NLRB volumes.

ment of facts contained in the Respondent's motion of February 8, 1963, and in Local 287's letter of opposition thereto of February 15, 1963, and shall proceed to disposition of that motion.

We are satisfied from the record in this case that none of the three employees involved abandoned their strike before September 15, 1961. Escajeda and Patino admitted continuing their strike past that date, and Ellis, although he "lost interest" on August 26, did not inform Respondent either that he had abandoned the strike or that he was willing to return to work. Thus, none of the three is entitled to backpay as to this period. However, they are still entitled to backpay for the discriminatory layoff of June 9, 1961, as set forth in our Supplemental Decision and Order.

We are also satisfied from the record as now amplified that the Respondent has satisfied its obligation to offer reinstatement to the employees involved. All of the employees have already stated unequivocally that they have employment elsewhere, and that they do not desire reinstatement of their employment with the Respondent. Hence,

IT IS HEREBY ORDERED that the Respondent's duty to continue its offer of reinstatement to Rual Dean Ellis, Manuel Escajeda, and Juan Patino, is eliminated from the Order. Also,

IT IS HEREBY ORDERED that the Respondent's request that the Board eliminate or rescind its order that the Respondent, upon request, bargain collectively in good

faith with Local 287, be, and it hereby is, denied as lacking in merit.[4]

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[4] It is the Board's long established policy to remedy unlawful refusals to bargain by requiring an employer to bargain with the union that represented a majority of its employees at the time of the wrongful refusal to bargain. See for example, *Karp Metal Products Co., Inc.*, 51 NLRB 627. This policy has been applied to a variety of factual situations and has received review and affirmance by the Supreme Court. *N.L.R.B.* v. *Bradford Dyeing Association*, 310 U.S. 318; *International Association of Machinists* v. *N.L.R.B.*, 311 U.S. 72; *N.L.R.B.* v. *P. Lorillard Co.*, 314 U.S. 512; *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702; *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96; *N.L.R.B.* v. *Warren Co., Inc.*, 350 U.S. 107. As indicated in those cases, this policy is designed, *inter alia*, to deny the employer who has wrongfully refused to bargain, the fruits of his unfair labor practice, and to insure, insofar as possible, that such practice does not deter his employees from freely exercising their rights under the Act. We apply it here for these reasons.

Dated, Washington, D. C. April 24, 1963.

Frank W. McCulloch, Chairman
Philip Ray Rodgers, Member
John H. Fanning, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX F

In the
UNITED STATES COURT OF APPEALS
For the Ninth Circuit

No. 18,745

SAKRETE OF NORTHERN CALIFORNIA, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, FREIGHT, CONSTRUCTION, GENERAL DRIVERS AND HELPERS, LOCAL 287, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and CEMENT PROCESSORS UNION,
Respondents.

STIPULATION

It is hereby stipulated and agreed between the National Labor Relations Board and Sakrete of Northern California, Inc., as follows:

1. That the statements of facts set forth in the Board's Decision and Order, 137 NLRB 1220 and its Supplemental Decision and Order, 140 NLRB No. 70 are assumed to be true, correct and supported by substantial evidence on the record as a whole.

2. That the Board's assertion of jurisdiction, the finding that Sakrete of Northern California, Inc., violated Section

8(a)(5) by refusing to bargain with Local 287, I.B.T.C. W.H.A. and that portion of the Board's order which requires Sakrete of Northern California, Inc., to bargain with Local 287, I.B.T.C.W.H.A., are the sole issues to be litigated in this case, all other findings and conclusions being admitted as true.

Dated at Washington, D. C. this 4th day of October, 1963.
Dated at Cincinnati, Ohio, this 1st day of October, 1963.

/s/ Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
/s/ William A. McKenzie
GRAYDON, HEAD AND RITCHEY
Counsel for Petitioner